

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: THUNDER BASIN COAL COMPANY, Petitioner v.
ROBERT B. REICH, SECRETARY OF LABOR, ET AL.
CASE NO: 92-896
PLACE: Washington, D.C. ✓
DATE: Tuesday, October 5, 1993
PAGES: 1- 47

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IN THE SUPREME COURT OF THE UNITED STATES

ORAL ARGUMENT -X

THUNDER BASIN COAL COMPANY :

On behalf Petitioner :

v. : No. 92-896

ROBERT B. REICH, SECRETARY :

OF LABOR, ET AL. Respondents :

-X

Washington, D.C.

Tuesday, October 5, 1993

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:56 a.m.

APPEARANCES:

WAYNE S. BISHOP, ESQ., Washington, D.C.; on behalf of
the Petitioner.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
the Respondents.

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1 P R O C E E D I N G S

2 (10:56 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 92-896, Thunder Basin Coal Company v.
5 Robert Reich.

6 Mr. Bishop, we'll hear from you.

7 ORAL ARGUMENT OF WAYNE S. BISHOP

8 ON BEHALF OF THE PETITIONER

9 MR. BISHOP: Mr. Chief Justice and may it please
10 the Court:

11 This is a case of Federal jurisdiction. To be
12 precise, the question is whether a Federal district court
13 has jurisdiction to hear a preenforcement challenge of a
14 substantive regulation issued by the Mine Safety & Health
15 Administration. The case is not here on the merits. The
16 case was decided below on a decision by Federal district
17 court issuing a preliminary injunction. The Court of
18 Appeals for the Tenth Circuit reversed on the
19 jurisdictional grounds.

20 Some understanding of the merits of what the
21 case is about is essential to understand the basis of this
22 appeal to this Court. What the case is about, the
23 substance of it, is the validity of a substantive
24 regulation issued by the Mine Safety & Health
25 Administration that deprived the mine operator of its

1 right to exclude nonemployee union organizers from its
2 premises.

3 The decision of the Mine Safety & Health
4 Administration in this respect is a regulatory decision.
5 It was an interpretation of a regulation issued by MSHA
6 several years before. The case was -- or the decision was
7 applied to petitioner. This is the first opportunity the
8 petitioner had to deal with the issue.

9 The question here before this Court is whether
10 this regulatory interpretation is properly reviewable in a
11 Federal district court on a preenforcement challenge.

12 QUESTION: Are you saying there's no way they
13 could have challenged this regulation prior to the
14 proposed enforcement action?

15 MR. BISHOP: That's right, Justice Souter. The
16 precise issue here was not decided in the original
17 regulation. The original regulation was a broad. The
18 precise issue here of whether a nonemployee union
19 organizer could be designated as a miner's representative
20 under the act was not part of that regulation.

21 QUESTION: Then, are they in fact challenging
22 the regulation?

23 MR. BISHOP: It is a direct challenge to the
24 regulation, but to the interpretation of the regulation
25 rather than the regulation as it issued at the time.

1 The focus on the issue here requires a little
2 bit of understanding of the factual background. Thunder
3 Basin is a mine operation in Wyoming. It is a nonunion
4 mine operator. The Mineworkers Union has tried to
5 organize the mine, unsuccessfully. It lost an NLRB
6 election several years before.

7 The United Mineworkers in 1990 adopted as part
8 of its organizing approach a tactic using section 813(f)
9 of the Mine Act, and that tactic was to ask employees of
10 the mine to designate the Mineworkers as a miner's
11 representative under the act. Section 813(f) of the
12 act --

13 QUESTION: Mr. Bishop, I just was a little
14 unclear from the papers, the mine representative is the
15 union itself or particular individuals?

16 MR. BISHOP: It can be the union or particular
17 individuals.

18 QUESTION: What is it in this case?

19 MR. BISHOP: It is the -- the designation was
20 for the United Mineworkers and two of its professional
21 organizers who are not employees of the mine, so it's a
22 dual designation, both the union and the professional
23 organizers for the union.

24 QUESTION: But does the Mine Safety Act
25 contemplate an organization being the -- having this

1 authority?

2 MR. BISHOP: Unfortunately, the Mine Act is not
3 clear on that, Your Honor, and the --

4 QUESTION: It seems a little incongruous to me.
5 I thought it had to be an individual walking around with
6 the Federal inspector.

7 MR. BISHOP: That is the practical effect of it,
8 but the designation was approved by the Mine Safety &
9 Health Administration as the designation of the union and
10 its professional employees.

11 QUESTION: And that would mean any officer of
12 the union? Any union representative could perform the
13 function under your view?

14 MR. BISHOP: As I understand the way the Mine
15 Safety & Health Administration administers the act, that's
16 correct.

17 QUESTION: I didn't get that out of the papers,
18 but that's --

19 QUESTION: In your view, it would not make a
20 difference if it had been only the two individuals who are
21 professional union organizers, you would have the same
22 objection and think that you could equally come into the
23 district court, is that -- do I understand that --

24 MR. BISHOP: That is correct, Your Honor.

25 QUESTION: Mr. Bishop, you could have refused to

1 recognize these representatives, I assume, and then stood
2 the risk of having a citation issued?

3 MR. BISHOP: That's correct.

4 QUESTION: And then you could have asked for a
5 review by the Commission, which would have gone to an
6 administrative law judge?

7 MR. BISHOP: That's correct, Your Honor.

8 QUESTION: And at that time, do you acknowledge
9 that you could have raised the same issue about the
10 validity of the regulation?

11 MR. BISHOP: It is -- that is a procedure that
12 is available under the act, too, is a procedure that the
13 mine operator here chose not to take for very special
14 reasons.

15 QUESTION: But it's your position that
16 notwithstanding the availability of that scheme, within
17 which -- the framework of which you could have raised the
18 challenge, that you can go direct to district court --

19 MR. BISHOP: That's correct, Justice O'Connor.

20 QUESTION: -- and challenge the validity of the
21 regulation?

22 MR. BISHOP: We believe that the statute
23 provides that opportunity, and this Court's decision in
24 Abbott Laboratories provides the basis for that approach.

25 QUESTION: Well, Abbott -- Abbott Labs, the

1 challenge to the regulation was a challenge to an
2 inevitable interpretation of the regulation. There was no
3 doubt that that regulation would have to be interpreted to
4 prevent what the company said could not lawfully be
5 prevented.

6 In your case, as you've acknowledged, the
7 regulation need not be interpreted that way. It might
8 have been interpreted ultimately differently.

9 MR. BISHOP: And we think it should have been
10 interpreted differently.

11 QUESTION: Well, so you should have waited your
12 turn to assert that. I mean -- or at least as far as
13 Abbott Labs is concerned. I don't know how you can invoke
14 Abbott Labs.

15 MR. BISHOP: Well, I don't -- my understanding
16 of Abbott Labs is it does not restrict to a choice of a
17 regulation that was not subject to multiple
18 interpretations.

19 QUESTION: Abbott Labs was part of a trilogy,
20 and it seems to me that your case comes closest to the
21 Toilet Goods decision. Tell me why not, why you think you
22 fall within the Abbott Laboratories decision and not the
23 Toilet Goods.

24 MR. BISHOP: Yes, Justice Ginsburg. I think
25 there's a major difference. The trilogy -- the two cases

1 where preenforcement challenges were allowed, were allowed
2 on the basis of ripeness, which I think is the point that
3 we're getting to here, and in the Toilet Goods v. Gardner
4 case, the Court found the case was not ripe yet. The
5 reason was in the application of the regulations.

6 In the two cases, Abbott and the other Toilet
7 Goods situation, the application of that reg caused the
8 companies to have to undergo a change in business
9 practices. They had to do things immediately. In
10 addition to that, the failure to follow the suggested
11 compliance approach would subject them to penalties both
12 civil and criminal, and the Court found in those two
13 circumstances that this was sufficient ripeness for the
14 action to happen.

15 Under the Toilet Goods -- Gardner v. Toilet
16 Goods case, the Court found that the application of the
17 regulations there were more general. They were not --
18 they did not require immediate action. The regulations
19 were phrased in the turn of the language, "may," rather
20 than "shall." The application was not felt by the
21 companies immediately, and therefore the Court concluded
22 it was not ripe, while the other two cases were.

23 In our situation, this was a very ripe decision.

24 QUESTION: But nothing is happening immediately.
25 All that's happening is you're posting two names, or maybe

1 three names, if you have to list the union.

2 MR. BISHOP: Well, that's the first thing that
3 happens. What happens after that is, those two names of
4 people then have access to records of the mine that they
5 would not have access to before. They have the ability to
6 participate in mine inspection.

7 QUESTION: I thought that the administrator said
8 that there would be very circumscribed availability of the
9 records, that they would not be available for any and all
10 purposes but only for this safety purpose.

11 MR. BISHOP: Even if the records are available
12 for safety purposes, Justice Ginsburg, it causes a major
13 change to the --

14 QUESTION: But you're speculating on a lot of
15 what may be, as distinguished from the Gardner -- Abbott
16 Laboratories, where there wasn't any question about what
17 was going to happen.

18 MR. BISHOP: Justice Ginsburg, I don't think
19 it's speculation. I think it's real life. These people
20 as designated representative miners, would have the
21 opportunity that they do not have under the National Labor
22 Relations Act in two respects. The National Labor
23 Relations Act for more than 40 years has had two major
24 principles, 1) -- it has many principles, but two that
25 relate here: 1) that employees or nonemployees who are

1 union organizers can be excluded from the premises except
2 for very unusual circumstances not presented here.

3 Second, the National Labor Relations Act says a
4 representative of employees has to do so only through
5 majority representation. What happens by this action is,
6 the Mineworkers have an advantage that they don't have
7 under the National Labor Relations Act. They have access
8 to the plant, access to certain records, and they are a
9 representative of employees, get to actually represent
10 them in matters such as administrative proceedings before
11 MSHA or before the review --

12 QUESTION: But that's exactly the position you
13 could argue ultimately before the Commission, as has
14 happened in other cases, I understand it has gone that
15 route.

16 MR. BISHOP: We could have, and the reason we
17 didn't, Your Honor, is because we were subject to the
18 potential of losing the very right that we wanted to
19 protect, and that was because, in a case that occurred,
20 the neighboring mine to Thunder Basin, just 2 months
21 before, MSHA approached the failure to post the
22 designation and said, we will issue a citation, and we
23 will fine you maximum daily penalties -- at that time
24 \$1,000 a day, now \$5,000 a day -- if you do not post it.

25 Under that circumstance, a mine operator cannot

1 go through the Review Commission and run its risk on 3 or
2 4 years of litigation. That case is now before the Court
3 of Appeals for the District of Columbia. In that case,
4 Kerr-McGee Mine capitulated. They obeyed it. They because
5 allowed the posting, and have challenged their legal right
6 in the D.C. circuit. property is basically a State law

7 right. Thunder Basin did not want to capitulate. It
8 believed its right was a valid right. It's been on the
9 books for more than 40 years -- nothing in the National Labor

10 Relation QUESTION: Are you saying the cost to that other
11 mine of capitulating compares to the cost to Abbott
12 Laboratories? BISHOP: It's a common law property right,

13 and in fact MR. BISHOP: Yes, Your Honor.

14 QUESTION: It didn't have preenforcement review
15 available to it? Act, you'd have exactly the same right.

16 MR. BISHOP: Yes. The cost to Thunder Basin, if
17 they had been subject to \$5,000 a day, which was -- federal

18 statutory QUESTION: No, I'm talking about the cost of
19 using the route that Congress directed. You said -- we
20 see in this other case they capitulated, and I'm asking
21 whether you have -- all the dire consequences that you
22 predicted had occurred in that other case. always been

23 upheld. MR. BISHOP: Well, Your Honor, we're dealing
24 with something more than monetary cost. We're dealing
25 with a very important cost to Thunder Basin, and that is

1 the cost of having to abandon a very important right.
2 This company has the right under the labor laws as
3 interpreted by this --

4 QUESTION: Mr. Bishop, can I interrupt, because
5 it's through your brief, now, the right to exclude a
6 stranger from your property is basically a State law
7 right, isn't it?

8 MR. BISHOP: It's a common law --

9 QUESTION: There's nothing in the National Labor
10 Relations Act that gave you that right. It merely didn't
11 authorize trumping that right.

12 MR. BISHOP: It's a common law property right,
13 and in some cases a State --

14 QUESTION: So if there had never been a National
15 Labor Relations Act, you'd have exactly the same right.

16 MR. BISHOP: That's correct, Your Honor.

17 QUESTION: So you're not relying on a Federal
18 statutory right.

19 MR. BISHOP: Well, we think we are. It's not a
20 right that has been written in an act of Congress.
21 However, over the 40 years that this issue has been
22 debated legally and in Congress, it has always been
23 upheld. This Court --

24 QUESTION: It's a limitation on the union's
25 right. It's a limitation on the worker's right, but the

1 underlying right of the owner is from State property law,
2 as Justice Stevens said.

3 MR. BISHOP: It certainly is, but four times
4 this Court, that I can recall, and I think there were
5 other cases, has discussed this employer's right in the
6 context of the full reach of the National Labor Relations
7 Act, and it has declined and refused to allow the other
8 interests under the labor laws to cause diminution of that
9 right. It is now very much a part of the fabric of the
10 labor laws.

11 QUESTION: The source of the right is State law.
12 The National Labor Relations Act deals with the worker's
13 right, and it doesn't give them a right to go as far as to
14 override the property owner's right. I don't see how you
15 attribute the property owner's right to the national labor
16 laws.

17 MR. BISHOP: Your Honor, I think after the many
18 cases that that this Court has looked at that right, and
19 looked at the many opportunities and arguments to weaken
20 that right because of other advantages or opportunities or
21 necessities created under the labor laws, that this right
22 now is a recognized part of the full rights under the
23 labor laws.

24 QUESTION: When a Federal law respects a right
25 under State law, it becomes a Federal law, is that the

1 position you're taking?

2 MR. BISHOP: It becomes part of the statutory
3 scheme. If it's not part of the congressional law, it is
4 part of the statutory scheme. What we're talking about
5 here --

6 QUESTION: Any time the Federal law doesn't
7 encroach on the State law domain, that State law then
8 becomes Federal law. That's the position you're taking.

9 MR. BISHOP: No, Your Honor, I don't mean to
10 draw it that starkly.

11 QUESTION: Well then, how does what is a State
12 property law become a Federal law when all the Federal law
13 does is says that the worker's right that this Federal law
14 deals with doesn't go as far as to override the State's
15 property --

16 MR. BISHOP: The only answer I can give to that,
17 Your Honor, is that it becomes part of the framework and
18 the fabric of the statutory scheme. It is a part, a
19 recognized part of what we call our labor laws. This
20 Court has affirmed that on four recent occasions, and all
21 the way back to 1956. It is not a statutory right, but it
22 is certainly a recognized right in the scheme of the labor
23 laws and how it's affected. What we have here --

24 QUESTION: Mr. Bishop, if the only cost to you
25 were the monetary cost, would you be making the argument

1 for review that -- would you be claiming the right to
2 review that you now claim?

3 MR. BISHOP: I don't think so. The issue here
4 is the validity of the right to exclude --

5 QUESTION: So the \$5,000 a day essentially is
6 not your argument, is it?

7 MR. BISHOP: Well, no, it is. What I mean by my
8 response, Justice Souter, is this. If it were not for the
9 existence of the right to exclude union organizers --
10 nonemployee organizers -- from the premises, the company's
11 situation would have been that the abatement cost were
12 very small, and it would not have been faced with the
13 daily penalty.

14 In other words, it would have litigated the
15 issue before the Review Commission, but the cost of having
16 to give up its right to exclude the union organizers is
17 the major cost here. That is the cost that causes the
18 company to fight, to go to seek preenforcement challenge
19 in court.

20 QUESTION: Well, you don't take the position
21 that every time you want to challenge an administrative
22 interpretation and there is a running daily cost against
23 it, that therefore a corporation such as yours should in
24 effect have the nonspecifically statutory review
25 opportunity that you're seeking. You don't take that

1 broad position, do you?

2 MR. BISHOP: We don't think the damages or the
3 cost would be sufficiently great to justify it.

4 QUESTION: Mr. Bishop, let me come back to your
5 contention that unlike Toilet Goods, this case does not
6 involve a "may," that there's a certainty of what would
7 happen. I understood it to be the case that it was not at
8 all certain that the agency in this case would issue a
9 citation. It had the option, which your action deprived
10 it of, of proceeding either the citation route, or it
11 could have gone to district court, couldn't it --

12 MR. BISHOP: Justice Scalia, that --

13 QUESTION: -- to enforce what it wanted, in
14 which case you would have had the same opportunity to make
15 the argument you ultimately made by going the roundabout
16 route to district court?

17 MR. BISHOP: Justice Scalia, that's not totally
18 correct. The statute, the operative statutory section
19 here, section 814(a), provides that when the Mine Safety
20 Health Administration investigates and finds that a rule
21 or regulation or an order of it is not being adhered to,
22 it must -- the statute says shall -- issue a citation.
23 There is a certainty of a citation here.

24 What follows the citation at that point is the
25 MSHA representative comes out again and says, we've issued

1 the citation, have you posted that notice yet? If Thunder
2 Basin says no, we have not posted it yet, they say, well,
3 we will give you X amount of days or hours -- what they
4 suggested to Kerr-McGee was 24 hours -- to post that
5 notice, otherwise we will proceed on a penalty case of
6 this amount. So it is a --

7 QUESTION: Well, must they proceed on the
8 penalty case? Do they then have the option to go into
9 district court as opposed to proceeding through
10 administrative penalty?

11 MR. BISHOP: Does the -- does the agency?

12 QUESTION: The agency, yes.

13 MR. BISHOP: Yes. The agency has an injunctive
14 relief statute that Congress gave them.

15 QUESTION: So it's not certain that it would
16 proceed by means of administrative penalty rather than
17 action in the district court.

18 MR. BISHOP: The statute says that MSHA must
19 issue the citation. Whether it then wishes --

20 QUESTION: No, what happens after the citation?

21 MR. BISHOP: After the citation, what normally
22 happens is that they proceed to go through the Review
23 Commission authorized --

24 QUESTION: But that is not mandated by statute.
25 They could go to district court.

1 MR. BISHOP: I think what they would do, if they
2 want to use --

3 QUESTION: No, but legally they could, couldn't
4 they?

5 MR. BISHOP: I'm not sure what their answer is,
6 is my hesitancy, but I think they have -- the circumstance
7 is I think they would do both. They would proceed through
8 the Review Commission, but if the issue was sufficiently
9 important, like something that endangered the health of
10 employees on an immediate basis, they would have the right
11 to go to the Federal district court to get a temporary
12 injunction against the practices.

13 We don't have an issue here that compels, or
14 anything like that. We have a statutory construction
15 issue, a legal issue.

16 QUESTION: Nothing happens immediately as a
17 result of the posting. Nothing then happens until
18 something -- until there's an incident at the mine, isn't
19 that so?

20 MR. BISHOP: That depends on the designee. They
21 have the right to initiate, or suggest initiation of
22 proceedings. If there's an inspection at the mine, they
23 proceed with the mine inspector. They walk around the
24 mine.

25 QUESTION: But that's -- what happens after the

1 posting? Conceivably nothing could happen, right?
2 Everything is going along fine at the mine, and there
3 isn't any cause for an inspection.

4 MR. BISHOP: There are four inspections a year,
5 and there are other reports that have to be submitted by
6 the mine operator. The mine representative has access to
7 those reports, has access to anything that relates to
8 safety and health that is involved in the functions of the
9 miner's representatives. They are fully able, fully
10 involved in the mine safety aspects.

11 That's what Congress intended, except what
12 Congress was focusing on was having mine employees be
13 involved. Congress did not address the issue of
14 nonemployees. It certainly did not -- and that's a --

15 QUESTION: I'm just trying to understand what
16 your exposure is, because we all recognize you have
17 conceded that the legal question of whether this is
18 improper interpretation of the regulation that union
19 representatives can be the designees, that that can be
20 settled in -- through the ordinary administrative route,
21 so I -- your whole case depends on something on the order
22 of an Abbott Laboratories disaster facing you, and I just
23 don't see that.

24 MR. BISHOP: Well, Justice Ginsburg, I think the
25 key to understanding that is to be in a position of a mine

1 operator.

2 The mine operator has a right, under our laws,
3 if he acts legally, to be nonunion, to operate nonunion.
4 What is happening here by this opportunity, an advantage
5 is being given to the United Mineworkers that is not
6 available under the National Labor Relations Act. This
7 mine operator wishes very sincerely to be a good employer
8 who is nonunion.

9 QUESTION: There are so many enterprises that
10 would love to come into district court in the first
11 instance and bypass a cumbersome administrative procedure
12 with ALJs and commissions, and most of them could make out
13 some kind of case that it would be far better if they
14 could, from their point of view, go right into district
15 court.

16 I just don't see where your case is
17 distinguishable from the great mass of enterprises that
18 would like to avoid the administrative process.

19 MR. BISHOP: I think the difference, Your Honor,
20 are two things. One is that by the action taken by the
21 Mine Safety & Health Administration, they are trying to
22 repudiate a legal right that the employer has.

23 QUESTION: Under State law.

24 MR. BISHOP: Under State law, if I agree with
25 that. I think it's broader.

1 In addition, what has happened here is the Mine
2 Safety & Health Administration has used a tactic that is
3 essentially very, very coercive to force the mine operator
4 to give up that right before a hearing, and that's what
5 makes this case different.

6 I also believe that Abbott Labs stands for the
7 principle that if the statute does not precisely preclude
8 preenforcement review -- I'm sorry, let me rephrase that,
9 because I went too far with it. If the intention of
10 Congress is not clear that Congress wanted to preclude
11 preenforcement challenges, then the preenforcement
12 challenges --

13 QUESTION: What decision do you get that from?

14 MR. BISHOP: Abbott Laboratories. Abbott says
15 very precisely that it picks up the presumption of review
16 decisions --

17 QUESTION: But Abbott Laboratories relied on --
18 I thought Abbott Laboratories relied on what was going to
19 happen immediately. All the labels were going to have to
20 be changed, all the promotional material had to be thrown
21 out --

22 MR. BISHOP: Well, Justice --

23 QUESTION: -- whole stocks would have to
24 destroyed --

25 MR. BISHOP: There are two parts to the Abbott

1 decision. Part 1 is, did Congress preclude preenforcement
2 challenges? Abbott said if Congress did not preclude
3 preenforcement challenges, then the presumption of review
4 is available. Point 2, Abbott said, is this case
5 justiciable under traditional principles of jurisdiction,
6 and that is the proposition that you're talking about
7 here.

8 QUESTION: That dictum in Abbott Labs doesn't
9 really square very well with Whitney Bank v. New Orleans,
10 does it, which is a case that Abbott Labs did not purport
11 to be overruling.

12 MR. BISHOP: I think it's completely consistent
13 with Whitney. I think Whitney stands for the proposition
14 that an administrative agency has certain expertise, and
15 when Congress prescribes an approach to go through that
16 administrative agency, the parties are mandated to do it.
17 Here, the statute does not preclude preenforcement
18 challenges. I think Abbott and Whitney are totally
19 consistent.

20 QUESTION: Well, I don't think it did in Whitney
21 Bank, either, explicitly. I mean, we're dealing with a
22 situation where there's no explicit preclusion.

23 MR. BISHOP: The difference is that in Whitney,
24 the court, after thorough analysis, came to the conclusion
25 that Congress did intend this as the only route. We say,

1 based on --

2 QUESTION: Not explicitly, however.

3 MR. BISHOP: You're correct, it was not
4 explicit, but from the statutory scheme, that was the
5 decision, so --

6 QUESTION: Mr. Bishop, I'd like to ask you one
7 question, if I may. There are really two different views
8 between you and your opponents on what the mine inspector
9 will do. On the one hand you say it will be able to
10 engage in organizing activities, look at records, and so
11 forth. On the other hand, there's this letter in the
12 Joint Appendix that your opponent, or the district
13 director wrote to you saying he really can't do anything
14 that we won't let him do. Which view of his authority is
15 it proper for us to assume is the correct one?

16 MR. BISHOP: Obviously, we think our view is
17 appropriate, for this reason. It is the very --

18 QUESTION: Is there anything in the record that
19 you have that demonstrates that what this Exhibit C says
20 about what he'll do is incorrect?

21 MR. BISHOP: No, Your Honor. That was litigated
22 on the decision on the merits by the district court judge,
23 who granted the permanent injunction.

24 QUESTION: But did he find as a fact that these
25 mine inspectors, safety inspectors would in fact engage in

1 organizing activities?

2 MR. BISHOP: Not that they would engage in
3 organizing activities, but that the potential was high,
4 and the opportunity was presented for them to do that.

5 QUESTION: Does that mean, like, talking to the
6 miners and sort of propagandizing the union, or just
7 finding out facts that will be useful in later -- I'm a
8 little puzzled about --

9 MR. BISHOP: Both of those, and the imprimatur
10 of Government authority placed on the Mineworkers Union by
11 being allowed into the plant with the Federal Government,
12 that's a substantial impact on the will of the voter if it
13 comes to an NLRA election.

14 QUESTION: Under your view, would it have been
15 permissible for employees to designate two union members
16 who happened to also be interested in organizing the mine
17 to be the mine inspector, but they were employees? I
18 assume some of your employees may be union members.

19 MR. BISHOP: That is totally permissible.
20 There's no legal argument against that.

21 QUESTION: They might do exactly the same thing
22 that these people could do.

23 MR. BISHOP: That's correct, Your Honor. We'd
24 have no legal argument against that.

25 QUESTION: Mr. Bishop, is there any concern here

1 about the lack of final agency action?

2 MR. BISHOP: I think not, Justice O'Connor. The
3 agency action here -- you have to recognize that the
4 statute looked at two different areas, regulations, and
5 enforcement. MSHA has responsibility for regulations.
6 This was the final decision of MSHA. MSHA has, under the
7 regulation here, delegated to the district manager the
8 responsibility under Part 40 of the CFR reg here.

9 The district manager is the one who made the
10 decision here, but even then the district manager
11 consulted at a higher level before he finalized it, but
12 this is final agency action. Under the Harrison case of
13 this Court, Harrison v. PPG, this Court says that final
14 agency action is the final word of the agency short of
15 enforcement, and that's where we are.

16 Thank you very much.

17 QUESTION: Thank you, Mr. Bishop. Mr. Wallace,
18 we'll hear from you.

19 ORAL ARGUMENT OF LAWRENCE G. WALLACE

20 ON BEHALF OF THE RESPONDENTS

21 MR. WALLACE: Thank you, Mr. Chief Justice, and
22 may it please the Court:

23 The starting point of our submission is the
24 reasoning of this Court in its 1981 decision in Donovan v.
25 Dewey, the one prior occasion on which this Court

1 considered the Federal Mine Safety Act of 1977, and in
2 particular its inspection provisions, and upheld their
3 constitutionality against a Fourth Amendment challenge
4 under Marshall v. Barlows, because no warrants are
5 required for the periodic inspections prescribed by this
6 act.

7 And in deciding that this was permissible for
8 Congress in treating this industry under this statutory
9 scheme, the Court pointed out at page 602 of Volume 452
10 U.S. that Congress was plainly aware that the mining
11 industry is among the most hazardous in the country, and
12 that the poor health and safety record of this industry
13 has significant deleterious effects on interstate
14 commerce, and the Court there cited some of the provisions
15 in the pre --

16 QUESTION: What is the case you're referring to?

17 MR. WALLACE: That is Donovan v. Dewey, 452 U.S.
18 594, the one previous case under this act. It is cited in
19 the briefs.

20 QUESTION: And what's the point you're making
21 about it --

22 MR. WALLACE: I -- I'm --

23 QUESTION: That this is an important piece of
24 legislation?

25 MR. WALLACE: Well, I'm --

1 QUESTION: We agree with that.

2 MR. WALLACE: Well, I'm showing that what this
3 court recognized in the legislative history and
4 legislative structure of the act is highly relevant to
5 analysis of that structure and the congressional purposes
6 as they relate to this case.

7 QUESTION: You're picking up on a case that's
8 cited, as far as I can see, only at the bottom of footnote
9 25 of the brief as your featured case?

10 MR. WALLACE: Well, it is the one case in this
11 Court that dealt with this act, and I'm just using it as a
12 starting point for our explanation of what Congress was
13 doing in revising the remedial provisions from the pre-
14 existing ones, because they was a considerable structural
15 change made in the penalty provisions, and this was based
16 on concerns about -- as the preamble of the act said, that
17 this Court pointed to in *Donovan v. Dewey*, and we've
18 reproduced this provision on page 1A of the appendix to
19 our brief.

20 The first one that the Court referred to is (c)
21 here, there is an urgent need to provide more effective
22 means and measures for improving the working conditions
23 and practices in the Nation's coal and other mines in
24 order to prevent death and serious physical harm, and in
25 order to prevent occupational diseases originating in such

1 mines.

2 Part of what Congress did in this legislation
3 was to, for basically the same reasons, replace what it
4 found to be cumbersome, repetitious, and ineffective
5 enforcement mechanisms in the prior law which it
6 complained in the committee reports were allowing
7 protracted litigation while the conditions that were cited
8 by the Secretary of Interior, who was administering at
9 that time, went uncorrected, and it replaced this with a
10 restructured and streamlined enforcement scheme that is
11 the scheme at issue here, and it created the Federal Mine
12 Safety Commission, a new agency independent of the
13 Department of Labor, to hear complaints, and for the first
14 time it included a system of daily penalties that could be
15 imposed for failure to abate a violation after the
16 violation has been cited.

17 The whole structure and purpose reflected in the
18 legislative history that we cite and that the Court itself
19 cited in *Donovan v. Dewey* in footnote 7, referring to the
20 pertinent Senate and House reports, was to tilt the
21 balance away from the direction of protracted litigation
22 while the violation remained uncorrected toward a system
23 that would provide incentives to correct the violation and
24 protect the health and safety of the miners and then do
25 the litigating.

1 QUESTION: This isn't an unsafe condition that's
2 sitting out there ready to kill somebody.

3 MR. WALLACE: But the question --

4 QUESTION: It's just the nomination of certain
5 individuals instead of others as inspectors.

6 MR. WALLACE: The question in the case goes to
7 the way this scheme will work and whether preenforcement
8 preemptive strikes, as the court of appeals called them,
9 can be brought in the district court to interfere with the
10 statutory process for abating any violation that has been
11 cited by the inspector.

12 So we must look, in determining how the act
13 should work, beyond the narrow confines of this case, and
14 I don't want to belittle the fact that Congress did think
15 for these inspections to be effective that the miners
16 should have a right to have a representative of their own
17 accompanying the inspector, perhaps pointing out things to
18 the inspector that the inspector would otherwise not have
19 brought to his attention.

20 A representative of the employer also
21 accompanies the inspector, so the employer's
22 representative is present along with the miner's
23 representative every step of the way and is there to see
24 to it that the miner's representative does not overstep
25 the bounds of the purpose for which he is present, which

1 is to assist --

2 QUESTION: Mr. Wallace, it's possible, is it
3 not, for nonemployees to be the representatives?

4 MR. WALLACE: That is correct.

5 QUESTION: And if that is so, suppose there's an
6 inspection unannounced? How do those employee -- or, how
7 do those representatives get notice?

8 MR. WALLACE: They don't get notice, and they
9 therefore do not invariably participate, and that is the
10 reason why, in the designation which appears at pages 29
11 and 30 of the Joint Appendix, the miners who designated
12 these two men to be their representatives designated
13 themselves, or some of themselves, as the alternates in
14 case these persons were unavailable.

15 This is part of the reason why there are
16 ripeness problems with the complaint that's being made
17 here. It's speculative whether these representatives
18 would even participate in an inspection, since there is a
19 criminal prohibition against giving anyone advance notice
20 of the inspection, and --

21 QUESTION: Well, do you take the position that
22 there's been final agency action here with regard to the
23 issue raised in the district court?

24 MR. WALLACE: We take the position that there
25 has not been, because there's never even been a citation

1 issued by the Mine Safety & Health Administration that
2 there has been a violation. We're at a very anticipatory
3 stage in the bringing of this lawsuit. An official of the
4 Department of Labor advised the petitioner that these
5 representatives are eligible.

6 QUESTION: Mr. Wallace, Mr. Bishop told us that
7 there are quarterly inspections, so that there would be
8 periodically inspections, and he also said that with
9 respect to finality the interpretation of the regulation
10 is final. The adjudication of the validity of that
11 regulation is something else, but why is that any less
12 final than, say, a change in the Federal rules that's put
13 in the rule books but that hasn't been tested in an
14 adjudication?

15 MR. WALLACE: Well, because the view of the
16 district director of the MSHA will not necessarily prevail
17 if petitioner wants to litigate it through the processes
18 that are channeled in the act for litigating it.

19 The Commission is an independent agency which
20 may --

21 QUESTION: Exactly.

22 MR. WALLACE: -- disagree with that
23 interpretation.

24 QUESTION: It's an independent agency, but so
25 far as the action of the -- what you might say the

1 prosecuting agency is concerned, that is final. It has
2 signed off, hasn't it?

3 MR. WALLACE: Well, there's --

4 QUESTION: I mean, in a sense, nothing's ever
5 final until a court -- you certainly wouldn't make the
6 argument, when an agency decides something, well, we don't
7 know whether that'll prevail until it gets to the district
8 court, and therefore it's not final.

9 MR. WALLACE: As it happens, there has been no
10 citation of the violation issued in this case.

11 QUESTION: Well, that's a different point.
12 That's a different point, but why -- I don't know why
13 going to a different agency, the independent Commission,
14 to get the validity of the first agency's decision
15 established, the necessity of going there, renders the
16 first agency's decision nonfinal. Is that the position
17 you're taking, it's not final until the Commission makes
18 an adjudication?

19 MR. WALLACE: Well, it's not final until the
20 agency has done a citation for a violation --

21 QUESTION: All right, you say the citation is
22 what renders it final.

23 MR. WALLACE: -- and has proposed a penalty.

24 QUESTION: The citation is what renders it
25 final. You agree it would be final when the citation

1 issued, at least.

2 MR. WALLACE: Well, it certainly would be more
3 final than it is now. It's not our case.

4 QUESTION: Mr. Wallace, in terms of where it is
5 now, you used the phrase a moment ago that the agency had
6 advised the Thunder Basin that, I think, as you put it,
7 these individuals are eligible. Has the agency actually
8 given a final designation to these individuals?

9 MR. WALLACE: Well, the agency doesn't do the
10 designating under the act.

11 QUESTION: Who does?

12 MR. WALLACE: It's just the miners choose their
13 representatives.

14 QUESTION: Well, the agency -- does the agency
15 have a formal act of recognizing the miners' choice?

16 MR. WALLACE: Well, there's no necessity for
17 that. It's only because a controversy --

18 QUESTION: They just show up?

19 MR. WALLACE: -- arose --

20 QUESTION: Excuse me, the agency doesn't do
21 anything, the day comes, and somebody just gets on the
22 phone and say, let's go over to the mine?

23 MR. WALLACE: Well, they -- I don't know who
24 would notify the miners' representatives to come. The
25 agency cannot give anyone advance notice.

1 QUESTION: Well, somewhere in the records of the
2 agency, there must be some -- there must be some
3 administrative act along the lines -- along the following
4 lines. The miners have designated or nominated the
5 following individuals, and we recognize that designation,
6 we accept that designation. Isn't there some such act as
7 that, and if there is, has that been done yet?

8 MR. WALLACE: There's nothing in the record on
9 that that I'm aware of.

10 QUESTION: Well, what should be done under the
11 statute, regardless of what's in the record?

12 MR. WALLACE: Well, under the statute, and under
13 the procedures that are used by the agency, groups of
14 miners can designate representatives, and they just make
15 the designation to the employer, who is supposed to do a
16 posting of the designation.

17 QUESTION: It doesn't even go through the
18 agency? The employers get in touch with the owners
19 directly?

20 MR. WALLACE: That is my understanding. I don't
21 think there's any requirement that the designation be made
22 to the agency.

23 QUESTION: Oh, I see, so that in effect is the
24 reason for your answer to Justice Scalia that the agency
25 doesn't do anything final until it issues a citation.

1 MR. WALLACE: The employees can designate --
2 that's correct. The employees can designate to the
3 employer who their representatives will be, and the
4 employer accepts that and posts the notice. There's no
5 need for the agency to get involved. It's only because a
6 dispute arose that the agency got involved in this
7 instance.

8 QUESTION: Mr. Wallace, can there be duplicate
9 designations? Can there be duplicate designations by --

10 MR. WALLACE: There can be -- there can be
11 duplicate designations.

12 QUESTION: Then what happens?

13 MR. WALLACE: Then the inspector can, if more
14 than one shows up, can choose -- can ask them to determine
15 among themselves which one should accompany him, or, if he
16 feels he would be aided by more than one, he can have more
17 than one going along, but the statute says there has to be
18 an equal number of representatives of the employer, so if
19 the employer chooses to have only one representative go
20 along, then only one representative of the employees can
21 go on the inspection. This --

22 QUESTION: Mr. Wallace, on this -- can you help
23 me understand Exhibit 9 in the Joint Appendix, which is at
24 page 29, which is the letter -- I don't know, it's
25 unsigned, but I gather this is the designation, and I

1 gather it was sent in by the union, and it names about
2 half-a-dozen or more people, and --

3 MR. WALLACE: Well --

4 QUESTION: -- but it doesn't say the union
5 itself -- your adversary said that the union was one of
6 the representatives. What does this say? How many
7 representatives are there in this case?

8 MR. WALLACE: In this particular instance, there
9 are only the two representatives listed on the exhibit
10 which you mention, which is on page 29. On page 22, in an
11 earlier designation, they were identified as affiliated
12 with, or associated with the union, but the union has
13 never been named in this instance as a designated
14 representative, although the regulation does allow an
15 organization to be named.

16 It happens that in this instance it was only the
17 two individuals who are employees of the union who were
18 designated on page 29, and then on page 30, the employees
19 designated themselves as alternative representatives,
20 alternate representatives in case these two people aren't
21 there for the inspection.

22 The inspections do take place under the statute
23 at least twice a year in this kind of mine, which is a
24 surface mine, but they're not on a regular schedule. The
25 four times a year requirement is for underground mines,

1 which are much more time-consuming to inspect. Even in a
2 large surface mine such as this one, the inspection
3 probably would not take more than 2 or 3 days, I'm told,
4 whereas an underground mine could take a month or two, if
5 it's a large facility, there are many problems there of
6 gases and structural problems that need to be looked into.

7 QUESTION: Mr. Wallace, the -- you said in the
8 brief there's an explicit designation of the court of
9 appeals as having exclusive jurisdiction. It's rather a
10 curious phrase that the statute uses. It's at section
11 816, paragraph 8, page 31 of your appendix.

12 It says, upon -- it says that "The Commission
13 shall file with the court the record in the proceeding,"
14 and then it says, "Upon such filing the court shall
15 have" -- that is, the circuit court -- "Upon such filing,
16 the court shall have exclusive jurisdiction of the
17 proceeding." It would seem to indicate that before the
18 filing there can be concurrent jurisdiction with some
19 other court.

20 MR. WALLACE: Well, I think that is to assure
21 that the review will proceed in only one court of appeals
22 and not in the D.C. circuit and also in the regional
23 circuit. That is what is --

24 QUESTION: Well, there's, I guess, various
25 explanations for the phrase. It indicates that -- but

1 it's rather odd to use the phrase, "upon such filing." In
2 section 1331 we don't say, upon filing there should be
3 jurisdiction, because obviously there can't be any
4 jurisdiction until something's filed.

5 MR. WALLACE: I think --

6 QUESTION: But it's certainly not the way
7 Congress usually acts when it purports to give exclusive
8 jurisdiction to a particular court or set of courts.

9 MR. WALLACE: I think it's to be read in
10 conjunction with the fact that the jurisdiction is
11 initially conferred for review either in the Court of
12 Appeals for the District of Columbia Circuit or in the
13 regional court of appeals, but upon filing in one of those
14 courts, then that court's jurisdiction becomes exclusive.
15 Before that, it would have been concurrent with the other
16 court.

17 I really think that it's just in the context of
18 that that Congress used this expression, and it's upon the
19 filing in one of the courts that that court becomes the
20 one with the exclusive authority in that case, so that
21 there won't be duplication of proceedings.

22 QUESTION: Mr. Wallace, the regulations, the
23 underlying regulations here, when they were promulgated,
24 there could have been a facial challenge to the
25 regulations. There wouldn't have been any finality issue

1 at that point, would there?

2 MR. WALLACE: Well, I think that is correct, and
3 certainly to the extent that the regulations are
4 legislative in nature.

5 There is in this act a provision that we refer
6 to in some detail on page 2 of our brief, section 811 of
7 the act, which is not one of the provisions set forth in
8 the appendix, but which is of some significance here in
9 illuminating the kinds of challenges to regulations that
10 are normally authorized. This is a provision that says
11 that the Secretary by rule shall develop and promulgate
12 improved mandatory health or safety standards for the
13 protection of life and prevention of injuries in coal or
14 other mines.

15 It's a big legislative rule-making
16 responsibility that has been placed on the Secretary, and
17 there is a subsection (d) there that provides for judicial
18 review of any of those rules by any person who may be
19 adversely affected by one of these new substantive rules.
20 He may at any time within 60 days of its adoption file a
21 petition challenging the validity of that mandatory
22 standard.

23 QUESTION: But your position is that an
24 interpretation of those regulations -- those regulations
25 we agree are final and subject to a facial attack within,

1 whatever, 60 days, then the administrator interprets one
2 of those regulations. That, you say, the interpretation
3 doesn't become final until there's an adjudication of the
4 correctness of the interpretation?

5 MR. WALLACE: Well, that's correct. That would
6 be a disputed issue, and the method of disputing it is
7 channeled by the statute, and we say that it was designed
8 to be an exclusive method and to eliminate the district
9 court's suits that had been such a problem under the pre-
10 existing scheme, in which --

11 QUESTION: But that's a different argument from
12 finality. Justice Ginsburg asked you, you know, whether
13 it was final or not. It seems to me finality is one
14 thing, and even though it's final, it may be that the
15 scheme of the statute shows that it is not yet
16 challengeable.

17 MR. WALLACE: That is correct. It is a
18 different argument, and our primary argument in the case
19 is that the statute set up an exclusive method for
20 handling of these disputes through an orderly,
21 administrative process, followed by review in the courts
22 of appeals and a centralized agency that would be acting
23 with expertise.

24 This is precisely what happened in the Kerr-
25 McGee litigation that was decided after this district

1 court complaint was filed, in which the administrative law
2 judge and then the Commission passed on an identical claim
3 that an employee of the union could not be designated as a
4 representative.

5 QUESTION: Mr. Wallace, Mr. Bishop concedes that
6 he could have gone that way, that his client could have
7 chosen that route, but I think his point is that there is
8 in this regime no counterpart to, say, 405(g) and (h) of
9 the Social Security legislation. There is nothing that
10 says, and this is the only way.

11 MR. WALLACE: There's nothing explicit that
12 precludes other remedies, but of course, that was true in
13 the Block case, and in Whitney Bank, and in many other
14 cases. There's another line of cases, not relied upon in
15 our brief but which I brought to Mr. Bishop's attention
16 yesterday, in which the court has held that detailed
17 remedies in a district court under a particular statute,
18 even though they don't in terms oust other possible
19 remedies, should sometimes be interpreted to be the
20 exclusive remedy provided for the particular kind of
21 complaint being made.

22 QUESTION: Well, you know, you could say that
23 the same kind of a scheme existed to some extent in Abbott
24 Labs. You have the provision in the APA, which says that
25 the remedy, if none other is provided, is suit in district

1 court to challenge the regulation after it's applied to
2 you. Nonetheless, we allowed an exception from that
3 normal scheme because of the severe hardship in that case.
4 Are you saying never?

5 MR. WALLACE: It wasn't --

6 QUESTION: Are you saying never here, or are you
7 saying that hardship isn't enough?

8 MR. WALLACE: Well, I -- what I think I'm
9 saying, or if -- is that hardship is not the sole
10 criterion.

11 What I'm suggesting about the Abbott Labs
12 trilogy is that while there is no crisp distinction about
13 when a preenforcement review has been recognized, a good
14 deal of light is shed on that by the distinction that does
15 exist in administrative law between legislative
16 regulations in which new substantive standards are being
17 imposed that affect primary conduct, and that is what the
18 Court talked about in Abbott Labs, that primary conduct
19 was being affected by what the agency did in that case.

20 And in the companion case that was held to be
21 ripe for review, Gardner v. Toilet Goods, the Court
22 referred to what the agency had done as amplifying the
23 statutory standard imposing new standards that will affect
24 the primary conduct of the people who brought the
25 challenge, whereas interpretations, or even interpretive

1 regulations, just purport to state the agency's position
2 about the meaning of the statute that someone can
3 litigate.

4 Now, typically, when there are provisions for
5 review of the validity of the new legislative regulations,
6 they have to be brought quite promptly. In this statute
7 itself, there's a 60-day provision. The suits in Abbott
8 Laboratories were brought within a matter of months. The
9 regulations there were adopted in June '63, and the suit
10 was filed in September of '63, and in the Toilet Goods
11 case in November of '63 for regulations adopted in June of
12 '63.

13 Here, the regulation really does not address
14 this issue. The regulation was issued in 1978. It's the
15 same issue that arises under the statute, whether the
16 outside representative --

17 QUESTION: Do we have any cases that say that,
18 that say that if you challenge a regulation facially you
19 have to do so within a certain amount? I mean, there are
20 statutory provisions that say the challenge must be
21 brought within 60 days, but I had always thought that
22 unless there is such a statutory provision, you can
23 challenge a regulation whenever.

24 MR. WALLACE: Well --

25 QUESTION: Assuming preenforcement challenge is

1 permissible.

2 MR. WALLACE: Assuming it's permissible, but
3 certainly laches is a criterion for when it should be
4 permissible.

5 I can't point to a case in which one has been
6 held untimely on the basis of laches, but I do think that
7 what's involved in this case is the kind of preemptive
8 strike that could undo the whole statutory scheme, because
9 any case before a citation is issued could be diverted
10 into district court on a very similar rationale.

11 As the court of appeals in this case pointed
12 out, it often can be said that there are other statutory
13 rights or claims made in the guise of constitutional
14 claims that are inconsistent with the agency's application
15 here.

16 QUESTION: Of course, you'd object even after
17 the citation was issued, wouldn't you?

18 MR. WALLACE: Well, we would, because the
19 citation --

20 QUESTION: Perhaps not on finality grounds, on
21 grounds that --

22 MR. WALLACE: The citation initiates the
23 statutory process, which is built in with incentives to
24 bring about compliance while the litigation is occurring,
25 but there's no pre-litigation deprivation of anything.

1 The petitioner's claims can be heard in that process and
2 on judicial review, and --

3 QUESTION: Would there be any mechanism whereby
4 during the administrative review the application of the
5 penalty could be suspended, or something? Is there any
6 temporary relief available?

7 MR. WALLACE: That can happen in the
8 administration of whether penalty should be assessed,
9 which is to be determined initially by a proposal by the
10 agency, and then is to be determined independently by the
11 administrative law judge and by the Commission.

12 In Kerr-McGee itself, the company decided to
13 comply and then just to contest the initial citation,
14 which wound up to be a \$300 penalty.

15 QUESTION: Could the court of appeals, where a
16 review ultimately lies, grant a stay of any of a penalty
17 imposed by -- in the administrative process before being
18 final?

19 MR. WALLACE: Well, it would have jurisdiction
20 under the All Writs Act, and it would require a pretty
21 extreme case.

22 QUESTION: But you would say that that takes
23 something really extraordinary to come -- to use an
24 extraordinary writ you have to have -- because your
25 argument -- tell me if I don't grasp it correctly. You've

1 got two points. You can enter the court 1) the day the
2 regulations come out. You've got 60 days to challenge the
3 regulations. After that the administrative process is it,
4 and you get to the court of appeals at the end of that
5 line. Is that --

6 MR. WALLACE: That is part of our submission,
7 that is correct, Justice Ginsburg.

8 QUESTION: So you can --

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
10 Wallace. The case is submitted.

11 (Whereupon, at 11:56 a.m., the case in the
12 above-captioned matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

Thunder Basin Coal Co. v. Robert Reich, Secretary of Labor, Et Al

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

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